Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1542

MARILYN W. ANDRULIS

and

ANDRULIS RESEARCH CORPORATION,
Petitioners,

v.

UNITED STATES *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. PLAIN MEANING OF § 1988

The Government in its brief in opposition (at 5) misconstrues the position of the petitioners, as well as that of the dissent below, by claiming that we rely upon "necessary implication" to find that the United States is an eligible fee-paying party under § 1988. While even the majority below acknowledged that "statutory autorization may be inferred by *necessary implication* from the statutory context in which a fee provision arises" (App. 5a (emphasis added)), it is petitioners' essential contention here that § 1988's requirement that fees be awarded to the prevailing party in "any action" "could not be broader," *Hutto* v. *Finney*, 437 U.S. 678, 694 (1978),

and thus, § 1988, *a fortiori*, directly and plainly covers those actions in which the United States is a party.

Petitioners' position is supported by the fact that both the First and D.C. Circuits have found that the term "any party" in the Clean Air Act attorney's fee provision, 42 U.S.C. § 7604(d), expressly covers the United States [1]; that the Rehabilitation Act's attorney's fee provision (§ 505(b)), modeled by Congress after § 1988, has been explicitly declared by Congress to cover the United States [2]; and that the leading scholarly commentary on this question fully endorses the position of the dissent below. Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 363-65 (1980).[3]

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[1] *NRDC* v. *EPA*, 512 F.2d 1351, 1353-54 (D.C. Cir. 1975) (*dictum*); *NRDC* v. *EPA*, 484 F.2d 1331, 1336, n.5 (1st Cir. 1973). See also *Sierra Club* v. *EPA*, D.C. Cir. No. 76-1073 (April 27, 1979) (Federal government did not contest award when statute merely provided "in any judicial proceeding").

[2] The dissent stated in this regard:

> "* * * Equally instructive is the fact that Congress only recently enacted Section 505(b) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2983, an attorneys' fees provision which, in the words of its sponsor, 'parallels the Civil Rights Attorneys' Fees Awards Act of 1976 . . . .' 124 Cong. Rec. S. 15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). The language of Section 505(b) is virtually the same as that of Section 1988. Section 505(b)'s sponsor and the accompanying Committee Reports made it clear that this attorneys' Fee provision is to be used to vindicate rights against the federal government." (App. 21a) (Footnotes omitted).

[3] In an effort to deflect attention from the critical importance of this *civil rights* issue, the Government (at 6, n.5) has attempted to assure this Court that the question will be resolved by *general* attorney's fee legislation. In so doing, it points to legislation, pending since the passage of § 1988 in 1976, which affords a trial judge discretion to award fees in *any* civil case (other than a tort action) which is lost by the United States. 125 Cong. Rec. S. 10925 (daily ed., July 31, 1979). While this legislation did pass the Senate almost a year ago, it is now considered highly controversial because of a fear that it will "chill", *inter alia*, United States enforcement actions. Because of the breadth of the pending legislation, its passage by the House is doubtful.

Moreover, the attorney's fee provision within the Copyright Act, 17 U.S.C. § 505 (1976), is also relevant here. That section provides that "[t]he court in its discretion may allow the recovery of full costs by or against *any party other than the United States or an officer thereof.* The court may also award a reasonable attorney's fee to the prevailing party as part of the costs." (Emphasis supplied.) As the House Report on this provision underscores, the significance of this language is that it "*makes clear that neither costs nor attorney's fees* can be awarded to or against 'the United States or any officer thereof.'" [1976] U.S. Code Cong. &. Ad. News 5659, 5779. (Emphasis supplied.) Were the majority's holding below correct, such language would be unnecessary because the reference to "any party" would not by itself even raise the possibility of recovering fees from the United States; moreover, Congress' evident concern with possible liability on the part of the federal government would make no sense.[4]

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[4] Indeed, it is the Government and the majority below who rely upon "necessary implication" to find that the United States is not covered under the civil rights aspects of § 1988. Section 1988, as a result of a Senate floor amendment, also provides that in situations where the United States unsuccessfully sues a private citizen in a tax case, the United States will pay fees. The United States was mentioned in this context because it was *only* when the United States was an un-

II. UNITED STATES LIABILITY UNDER § 1988 STATUTES

The United States, finding no clear rationale in the statute or the legislative history to support the underlying inequity of its position (*i.e.*, that it alone among civil rights violators need not pay attorney's fees to prevailing plaintiffs), further contends (at 8-9) that the civil rights statutes referenced within § 1988 barely apply to the federal government. We have, however, cited in our petition (at 10-11, n.13) a large number of cases in which the United States or its officials have been held liable under four of the six civil rights statutes included within § 1988. Moreover, the Assistant Attorney General for the Civil Division, when testifying upon § 1988, expressly acknowledged that the civil rights statutes referenced therein apply to the United States.[5]

The Committee Reports accompanying § 1988 also cite cases brought against Cabinet officers under Title VI of

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successful plaintiff that fees would be assessed. Fees were not to be assessed in "any" IRS action. See, *e.g.*, *Key Buick Co.* v. *Commissioner*, No. 2781 (5th Cir., March 19, 1980) ("For an award of attorney's fees to be appropriate [in taxpayer litigation], the government must be the initiating or moving party.") But, the Government and majority contend that, because the United States was mentioned in this limited IRS context, it must be that the failure to specify that civil rights actions against the United States would be included within "any [civil rights] action," therefore means that the United States is exempt from liability in the civil rights context. For a fuller treatment of the Government's contention in this regard, *see* the dissent at App. 19a-20a, n.10.

[5] "Awarding of Attorney's Fees," *Hearing before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. (Ser. No. 64) at 176-77 (Assistant Attorney General Lee stated: "Actions under the statutes involved have been brought against both Federal officers and private individuals.")

the Civil Rights Act of 1964, 42 U.S.C. § 2000d—one of the statutes covered by § 1988.[6] Indeed, one week before petitioners filed for attorney's fees in this action, the United States entered into a consent decree in litigation brought against it under Title VI and Title IX of the Education Act Amendments of 1972 (20 U.S.C. § 1681) (also covered by § 1988) and agreed therein to the award of attorney's fees to plaintiffs pursuant to, *inter alia*, § 1988.[7] Finally, in this very case, the United States consented to a settlement pursuant to civil rights claims covered by § 1988, and this Court's recent decision in *Hanrahan* v. *Hampton*, No. 79-912 & 79-914 (June 2, 1980), also makes it clear that a civil rights action covered by § 1988 could properly proceed against United States' officials.

In short, the Government's contention that it is reasonable for it alone to be exempt from § 1988's sweep on the ground that the § 1988 statutes have little or no applicability to the United States is wholly unsupportable.

III. CURRENT CONFLICT

The Government's effort (at 7) to dismiss the fact that there is presently a conflict among the Circuits on the § 1988 issue is equally unpersuasive. At the time the instant petition was filed, the Seventh Circuit had awarded fees against the United States, *inter alia*, under § 1988 in *Hampton* v. *Hanrahan*, No. 77-1698 (December 15, 1979) at 13. It did so (despite the fact that the federal defendants there were only sued in their personal

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[6] See, *e.g.*, H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 5, 7 (1976) (*citing Hills* v. *Gautreaux*, 425 U.S. 284 (1976), and *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*)).

[7] See, *e.g.*, *Adams* v. *Califano*, C.A. No. 3095-70 (D.D.C., May 3 and 5, 1978); *WEAL* v. *Califano*, C.A. No. 74-1720 (D.D.C., May 3, 1978).

capacities) by relying upon that portion of *Hutto* v. *Finney*, 437 U.S. 678, 693, 700 (1978), which held that fees may not be awarded under § 1988 against governmental defendants in their personal capacity unless there is a showing of bad faith. Since bad faith had not been shown in *Hampton* on the part of any state or federal official, the Seventh Circuit awarded the fees against all of the governmental instrumentalities represented by the defendants there, including the United States.

On February 7, 1980, the United States petitioned for rehearing claiming that § 2412 barred an award against the United States and urged (at page 15 of the petition) that the Seventh Circuit "should clarify . . . its order to show that only the state and not the federal government can be liable for fees under 42 U.S.C. § 1988." The Seventh Circuit, however, in an April 15, 1980, order attached as an Appendix hereto merely struck a portion of a paragraph from its opinion explaining why it awarded the fees against the governmental bodies, and stood by its ruling "that one-third of the fees award should be paid by the federal defendants . . . ." Since, as the Seventh Circuit acknowledged, *Hutto* does not permit fees in this context to be paid by governmental officials sued as individuals, the import of the judgment was that the United States had to pay its share of the fees in question. Such a judgment is consistent with that portion of the Senate Report accompanying § 1988 which provided that when a governmental official is sued and no bad faith is shown fees "will be collected from the official, in his official capacity, from funds of his agency or under his control, or from the . . . government (whether or not the agency or government is a named party)." S. Rep. No. 94-101, 94th Cong., 2d Sess. at 5 (footnote omitted).

While it is true that this Court recently reversed the Seventh Circuit fee award on other grounds (*i.e.*, it was premature), *Hanrahan* v. *Hampton*, Nos. 79-912 & 79-914 (June 2, 1980), the Seventh Circuit's position that fees could be awarded against the United States was clearly unaffected by that decision, and a conflict thus persists.

When this conflict is added (a) to the obvious confusion over this question—as evidenced by the United States' conceding the issue at the trial level in the companion case below [8] and in other litigation (see text accompanying n.7, *supra*)—and (b) to the question's direct impact upon the construction of other fee statutes which do not expressly mention the United States by name (such as the Clean Air (42 U.S.C. § 7604(d)) and Water (33 U.S.C. § 1365(d)) Acts and the Rehabilitation Act (see n.2, *supra*)), it is clear that this important matter is ripe for dispositive treatment by this Court.[9]

IV. SECTION 634(b)

Petitioners also have asked this Court to examine the question of whether the "sue and be sued" clause within § 634(b) of the Small Business Act would permit a § 1988 award against the Small Business Administra-

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[8] *NAACP* v. *Civiletti*, No. 79-1543 (*petition for certiorari pending*).

[9] The Government also places great reliance (at 5-7) upon the fact that this Court has already once before denied certiorari in a case raising the issue presented here. *Shannon* v. *HUD*, 577 F.2d 854 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978). The Third Circuit, however, did not have the benefit either of this Court's decision in *Hutto* v. *Finney*, *supra*, or, as evidenced by the fact that *Shannon* was a two-page *per curiam* opinion, many of the arguments advanced by petitioners below and fully considered by the split panel of the District of Columbia Circuit. We respectfully suggest this case and its companion provide the Court with a much fuller record to resolve the issue than that found in *Shannon*.

tion ("SBA"), even if § 1988 by itself did not provide a general waiver against the United States. The Government responds (at 9-10) that the question is meritless because § 634(b) does not provide for attorney's fees. However, we rely upon § 634(b) solely as an "express statutory consent" [10] to suit which places the SBA "upon an equal footing with private parties" [11] for purposes of the incidents of litigation. If SBA is on such an equal footing, it must, as is true of every other private party, pay fees to a prevailing civil rights plaintiff under § 1988. Hence, §§ 634(b) and 1988 read together satisfy the need for a statutory waiver for attorney's fees found in 28 U.S.C. § 2412.

The Government also argues (at 9) that, since petitioners' suit was one for injunction and since § 634(b) bars injunctive relief against the SBA, our contention that fees should be awarded pursuant to § 634(b) is "frivolous." As the Government knows full well, however, it has been widely held that when the SBA "Administrator acts beyond the scope of his authority 15 U.S.C. § 634(b) does not preclude injunctive relief." *Dubrow* v. *SBA*, 345 F.Supp. 4, 7 (C.D. Calif. 1972). It was on this basis that the district court below, over the Government's objection, entered a temporary restraining order against that agency. Transcript of Proceedings, November 11, 1977.[12] In any event, the complaint in this action was for damages as well as injunctive relief, and we no longer seek to use § 634(b) for injunctive relief, but solely to obtain fees. The payment of attorney's fees by SBA is not a form of relief barred by § 634(b).

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[10] *Mar* v. *Kleppe*, 526 F.2d 867, 870 (10th Cir. 1975).

[11] *RFC* v. *Menihan Corp.*, 312 U.S. 81, 85-86 (1941).

[12] Indeed, if § 634(b) were a bar to relief, the United States could have presented it as a defense below rather than settling the litigation by permanently placing petitioners in the § 8(a) program.

V. UNDERLYING FACTS

The questions presented in the petition are strictly legal in nature and do not rest upon the underlying facts. However, the Government, in an obvious effort to cast a cloud over the petition, has suggested (at 2-3) by innuendo that petitioners never properly belonged in the § 8(a) program. It is difficult in a reply brief to fully address these assertions which are either misstatements of fact [13] or a gross distortion of the record.[14] Suffice it to say, that the Government, two days prior to having to answer detailed discovery requests about the way in which the § 8(a) program was operated, settled the underlying case by acknowledging in a consent order that the decision to admit petitioners to the § 8(a) program, which was reviewed at seven different SBA levels (J.A. 74-75), consisted of

> "proper and correct findings and conclusions which support [petitioners'] reinstatement to the § 8(a)

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[13] For example, the Government states (at 2) that Dr. Marilyn Andrulis "holds an Associate Professorship in Chemistry . . . ." Dr. Andrulis does not now hold, nor has she ever held, such a position, and there is nothing in the record of this case which so states.

[14] The record of this case includes findings of the National Research Council, the National Academy of Science, and the United States Civil Rights Commission showing that women scientists are heavily discriminated against in employment and in the federal contracting process. J.A. 65-66. Dr. Andrulis showed, when applying to the § 8(a) program, that she in fact experienced both kinds of discrimination. She especially showed that she faced that discrimination in her prior employment before she founded her own company. J.A. 64-65. The Government then could not have stated the opposite of the truth with greater precision when it claimed (at 2) that Dr. Andrulis founded ARC "after *enjoying* a series of *high level* positions . . . ." (Emphasis added.)

> program and which support a further finding that the problems experienced by [petitioners] in obtaining government contracts are not common in kind or degree to those of other small businesses." J.A. 106-07.

While the Government did originally contest the question whether petitioners had "prevailed" on their civil rights claims for purposes of § 1988, the Justice Department ultimately informed the court of appeals shortly before oral argument that it no longer wished to press that issue. App. 32a-33a.

It should also be noted that in Senate hearings a high level SBA official testified:

> "[I]f the Andulis [sic] case is typical of the treatment given women-owned business entrepreneurs by procurement officials, the documentation of such will meet the eligibility test for being socially disadvantaged and qualified to receive 8(a) contracts under the existing administrative authority." J.A. 76.

The SBA decision to terminate petitioners from the § 8(a) program was expressly criticized by the House during investigations of that program (J.A. 83) as well as by the United States Civil Rights Commission (J.A. 87). Indeed, the SBA Administrator acknowledged during a Congressional investigation that petitioners were fully eligible for the program. J.A. 83. Moreover, the ownership makeup and net worth of the owners of the company placed petitioners well within the mainstream of the 1485 participants within the § 8(a) program. J.A. 80-81. Indeed, their net worth at the time of their admission was within the lower quartile of all program participants. J.A. 80.

To the extent, however, that this Court is concerned about the factual underpinnings of this case, the undisputed affidavit of Dr. Marilyn W. Andrulis is included within the Joint Appendix (at 60-89) filed with the court of appeals, and that Joint Appendix has been lodged by petitioners with the Clerk of this Court.

CONCLUSION

For the reasons stated here and in the petition, the writ should be granted.

Respectfully submitted,

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Dated: June 9, 1980

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 15, 1980

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

Nos. 77-1698, *et al.*

IBERIA HAMPTON, *et al.*,
Plaintiffs-Appellants,

vs.

EDWARD HANRAHAN, *et al.*,
Defendants-Appellees.

On Petitions for Rehearing

ORDER

On consideration of the motions filed by the state and federal defendants, respectively, for rehearing and suggestions for rehearing *en banc* of the order with respect to the award of attorney fees issued on December 12, 1979,

IT IS ORDERED that the penultimate paragraph on page 13 of that order be amended to read as follows:

> Plaintiffs' attorneys fail to suggest how the fees should be apportioned between defendants. We hold that one-third of the award should be paid by the

federal defendants and two-thirds should be paid by the state defendants.

The remaining portion of that paragraph is deleted.

IT IS FURTHER ORDERED that the state defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* concerning attorney fees is hereby DENIED.

IT IS FURTHER ORDERED that the federal defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* is hereby DENIED.

IT IS FURTHER ORDERED that the motion filed by the United States to intervene is hereby DENIED.

PELL, *Circuit Judge*, concurring.

* * * *